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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 608

LOUIS PIZITZ DRY GOODS COMPANY, INC.,
A CORPORATION,
Petitioner,

vs.

E. L. DEAL, K. T. TYREE AND EDWARD N. HAMMILL, EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY J. WILLINGHAM, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WILLIAM S. PRITCHARD,
WINSTON B. MCCALL,
Counsel for Petitioner.

PRITCHARD, MCCALL & JONES,
Of Counsel.

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vs.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Louis Pizitz Dry Goods Company, Inc., a corporation, Birmingham, Alabama, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review a decision entered December 29, 1953 (rehearing denied February 3, 1954), reported 208 F. 2d 724, affirming a judgment of the United States District Court for the Northern District of Alabama.

The opinion below appears at page 120 of the Record.

Summary Statement of Matter Involved

This action was filed in the United States District Court for the Northern District of Alabama to recover federal income and excess profits taxes erroneously collected for the years ended January 31, 1942 through January 31, 1947, inclusive. The District Court entered judgment denying recovery. This judgment was affirmed on appeal.

Public Law 756 (Act of September 5, 1950, c. 851, 64 Stat. 593; 26 U. S. C. Supp. V., Sec. 22), a remedial statute, authorized taxpayers using the "Last-in, First-out" method of inventorying for any taxable year beginning after December 31, 1940 and prior to January 1, 1948 to invoke the provisions of Section 22(d)(6)(A), Internal Revenue Code, relating to the involuntary liquidation and replacement of elective inventories, provided the taxpayer elected "at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe."

The 1950 Act was made expressly retroactive by its terms "to taxable years beginning after December 31, 1940."

The purpose of the 1950 Act was to remedy the inequity suffered by taxpayers who had failed to make a timely election under the prior law, requiring the election to be made at time of filing of the return. The House and Senate Reports state in pertinent part that the Act "corrects the language of the present law relating to the method of making an election which has resulted in an unintended hardship for some taxpayers, in some cases taxpayers did not know, at the time the return was filed, that it would be to their advantage to make such an election."

See:

U. S. Code Congressional Service, 81st Congress, Vol. 2, p. 3576 (1950); *House Report* 2756; *Senate Report* 2366.

Congressional Record, Vol. 96, Part 9, Page 11502, 81st Congress, 2d Session, August 1, 1950.

At the time of the enactment of the 1950 law, Petitioner here had made an election to invoke Section 22(d)(6) in literal compliance with the regulations (R. 70). This election related to the years involved in this case and had been on file with the Commissioner since September 18, 1948 (R. 69).

The election had not been made prior to that time because "with the confusion and uncertainty then existing at the time of filing its tax returns for the years here involved and at all times prior to the decision of the Tax Court in the *Hutzler* case, it was impossible to express an election whether to have the benefits of the involuntary replacement provisions contained in said Section 22(d)(6)" (R. 67).

The fact is that "at the time of filing its return for the tax years involved, plaintiff and other retail merchants similarly situated were faced not only with the refusal of the Commissioner to recognize their right to use Lifo, but also with the complete failure on the part of the Commissioner to furnish any basis upon which such taxpayer could calculate Lifo and determine whether or not to elect involuntary liquidation and replacement of inventory provision" (R. 67).

The case of *Hutzler Bros.* v. *Commissioner,* 8 T. C. 14, decided January 14, 1947 challenged the right of the Commissioner to deny retail merchants the benefits of the "Lifo" provisions of Section 22(d), Internal Revenue Code, because of their taking inventory on the "retail method". Only after this case was decided in favor of the taxpayer did the Commissioner amend his regulation to permit such merchants to elect "Lifo" and the involuntary liquidation provisions contained in Section 22(d) (R. 68).

Not until May 3, 1948 did the Commissioner publish Bureau of Labor price indices to be used by "Lifo" taxpayers, and until this index was published, no taxpayer situated as was this Petitioner could determine or calculate the amount of tax justly due and owing the United States (R. 72).

The Commissioner of Internal Revenue and the Courts below held that the election filed by Petitioner in September 18, 1948 was not timely filed and denied relief. The Court of Appeals held specifically that a 1951 regulation issued by the Commissioner under the 1950 Act providing that the election had to be filed "not later than six months" after time of filing the return was valid and that "the taxpayer's election of September 18, 1948 was not filed within the time prescribed by this regulation" (R. 126).

The Court of Appeals further decided that a 1953 change in the regulation as contained in Treasury Department Regulations 118, approved September 26, 1953, which construed the 1950 Act in the manner here contended for by Petitioner and which expressly authorized the election thereunder to be made "at any time, not later than December 15, 1952," should be interpreted to apply to a taxable year consisting only of two months, namely, the months of January and February, 1952, and not to the years involved in this action (R. 127).

Jurisdiction

This civil action arises under the Revenue Laws of the United States and particularly the Internal Revenue Code, Title 26, United States Code, Chapter 1, and as such was within the jurisdiction of the District Court under provisions of Title 28, United States Code, Section 1340.

The Statute of the United States, the construction of which is involved in this petition, reads:

"Section 22(d)(6)(A) (relating to the involuntary liquidation and replacement of elective inventories) is hereby amended as follows:

(1) By amending that portion thereof preceding clause (i) to read as follows:

"(A) Adjustment of Net Income and Resulting Tax.—If, for any taxable year beginning after December 31, 1940, and prior to January 1, 1948, the closing inventory of a taxpayer inventorying goods under the method provided in this subsection reflects a decrease from the opening inventory of such goods for such years, and if the taxpayer elects, at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe, to have the provisions of this paragraph apply, and if it established to the satisfaction of the Commissioner, in accordance with such regulations, that such decrease is attributable to the involuntary liquidation of such inventory as defined in subparagraph (B), and if the closing inventory of a subsequent taxable year, ending prior to January 1, 1951, reflects a replacement, in whole or in part, of the goods so previously liquidated, the net income of the taxpayer otherwise determined for the year of such involuntary liquidation shall be adjusted as follows:

(b) The amendments made by this section shall be applicable with respect to taxable years beginning after December 31, 1940."

Act of September 5, 1950, c. 851, 64 Stat. 592 (26 U. S. C. 1946 Ed., Supp. V, Sec. 22).

Jurisdicition of this Court to review by writ of certiorari the decision of the Court of Appeals for the Fifth Circuit is invoked under provisions of Title 28, United States Code, Section 1254.

The decision sought to be reviewed was entered December 29, 1953, rehearing denied February 3, 1954.

Questions Presented

1. Should the principles announced in *J. E. Riley Inv. Co.* v. *Commissioner of Internal Revenue,* 311 U. S. 55, 61 S. Ct. 95 be applied where Congress by a special retroactive statute has ameliorated the strictness of an existing statute governing the time for making an election?

2. Should the Commissioner of Internal Revenue be allowed to change the remedial purpose of a law and thwart the will of Congress by adding to the words of the law a time limit for making an election of six months from date of filing a return, effective throughout the nine year period prior to passage of the law?

3. Should an Act of Congress be construed to permit the delegation to the Commissioner of an unlimited retroactive authority for fixing the time to make an election?

4. Should the words, "taxable year" as used in the applicable regulations of the Commissioner of Internal Revenue be judicially construed to mean only the months of January and February, 1952, contrary to the plain language of the regulations?

5. Should a taxpayer be held to forfeit a right of election for lack of timeliness, during the period such right was erroneously withheld from him by the Commissioner and before the Commissioner prepared regulations which would permit taxpayer to compute its tax or know the benefits it might obtain from making such election?

Reasons for Granting Writ

Your Petitioner respectfully prays that the Writ be allowed for the following reasons:

I

There is in issue a disputed question of statutory construction of a special retroactive relief measure enacted by

Congress in 1950, of primary importance in the administration of the revenue laws of the United States, which has not been and which should be settled by this Court.

The language of this extraordinary relief measure and the circumstances which prompted its passage are convincing, as in the case of *U. S.* v. *Ogilvie Hardware Co.*, 330 U. S. 709, 67 S. Ct. 997 (1947), that Congress intended to provide refunds to taxpayers, situated as this Petitioner, who were otherwise entitled to the benefits of involuntary liquidation and replacement of inventory provisions of the Internal Revenue Code, but who had been denied such benefits solely because of an alleged untimeliness of an election filed to invoke them.

II

Clarification should be made of the limits on the rule-making power of the Commissioner of Internal Revenue, and specifically of the Commissioner's right to deny taxpayers retroactive benefits granted by an Act of Congress, and thus "to create a rule out of harmony with the statute" in a manner denounced by this Court in the case of *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 134, 56 S. Ct. 397, 400 (1936).

III

The Court has construed an Act of Congress in a manner which raises grave doubts regarding its constitutionality as a valid delegation by the Congress of its essential legislative function.

Construing Public Law 756, as a delegation to the unbridled discretion of the Commissioner of Internal Revenue of the right to fix the time for making elections thereunder retroactive throughout more than nine years prior to the enactment of said law, places it in violation of this principle as announced in the cases of *Panama Refining Co.* v. *Ryan*,

293 U. S. 388, 55 S. Ct. 241, 248, 262 (1935) and *Schechter Poultry Co.* v. *U. S.*, 295 U. S. 495, 55 S. Ct. 837, 843 (1935).

IV

An important question involving the correctness of a judicial construction placed on a 1953 regulation of the Commissioner of Internal Revenue should be passed on.

The Court below held general language contained in Treasury Department Regulations 118, Sec. 39.1-1(b) to apply to and limit a matter specifically dealt with in Sec. 39.22(d)-7(a) of Regulations 118, a decision probably in conflict with applicable decisions of this Court in the cases of *Clifford F. Mac Evoy* v. *U. S.*, 322 U. S. 102, 107, 64 S. Ct. 890, 894 (1944); *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208, 52 S. Ct. 322, 323 (1932).

WHEREFORE, your Petitioner respectfully prays that a writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, as provided in the Statutes of the United States, that the judgment of the Court of Appeals be reversed, and that Petitioner be granted such other and further relief as may seem proper.

WILLIAM S. PRITCHARD,
WINSTON B. MCCALL,
Counsel for Petitioner.

PRITCHARD, MCCALL & JONES,
Of Counsel.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement

The facts in this case for purposes of consideration of this Petition are stated at pp. 2-4, inclusive, *supra.*

Jurisdiction

This action arose under the Internal Revenue Laws of the United States. The applicable statutes conferring jurisdiction are set forth at pp. 4-5, inclusive, *supra.*

Specifications of Error

For the errors which Petitioner will urge if the Writ of Certiorari is granted, the Court is respectfully referred to that part of the Petition which sets forth the questions presented, p. 6, *supra,* and to that part which states the reasons why the Writ should be granted, pp. 6-8, *supra.*

Argument

1. A TREASURY REGULATION ADDING A "SIX MONTHS" RETROACTIVE TIME LIMIT FOR MAKING THE ELECTION AUTHORIZED IN PUBLIC LAW 756, IS CONTRARY TO THE PLAIN MEANING OF THE LAW AND IS INVALID.

The Act of September 5, 1950, quoted, *supra,* page 5, was drawn in a generous mood and enacted by Congress in language correspondingly generous. It specifically eliminated the prior statutory requirement that the election to invoke involuntary liquidation must be made at the time of filing taxpayer's return.

The statute plainly states that it shall be retroactively "applicable with respect to the taxable years beginning after January 1, 1940." The language is plain and unambiguous, not difficult of understanding.

The statute is not a general tax exemption to be interpreted in the frameworks of a currently operating general revenue law. It is a "special retroactive relief measure" falling squarely within the statutory category so recognized by this Court in *United States* v. *Ogilvie Hardware Co.*, 330 U. S. 709, 717, 67 S. Ct. 997, 1001.

By the 1950 Act, Congress ameliorated the strictness of the existing law governing the time for making elections, in the manner sanctioned by this Court in *J. E. Riley, Inv. Co.* v. *Commissioner of Internal Revenue*, 311 U. S. 55, 59, 61 S. Ct. 95, 97.

The statutory language is of the present and future, not of the past. The statutory words "elects at such time" means now or a later date, not in retrospect. Nowhere in the statute do the words "six months" appear. Nor are there any words importing a delegation to the Commissioner of the right to fix retroactively the time for election.

Looking to the record, it is without dispute that as of the effective date of said Statute, this taxpayer had on file with the Commissioner, First: Full, true and accurate returns prepared in keeping with Commissioner's 1948 Regulations, in which taxpayer had plainly made its election to take advantage of the involuntary liquidation provisions of said Statute, for each year here in question, and had set forth all facts necessary to entitle plaintiff to said relief. Second: Claims for refund setting forth the detailed computations of its taxes so computed, and the amount of the refund due (R. 69-71).

Properly construed according to its plain language, the 1950 Act means that its benefits shall be retroactive and shall be available to all taxpayers entitled thereto at the time of its enactment.

The Commissioner by his regulation has altered and added to the statute by requiring the election to be made

"at any time not later than six months after the time of filing his income tax return for the year of liquidation." Treas. Reg. 111, Sec. 29.22(d)-7. Treas. Reg. 118, Sec. 39.22(d)-7(a).

Such a limiting regulation applied here retrospectively throughout a nine year period, is not consistent with the statute. It does not carry out the will of Congress as expressed by the statute. It is therefore a nullity. The decisions of the courts below upholding the regulation conflict with the principle announced by this Court, that "the power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

Manhattan General E. Co. v. *Commissioner of Internal Revenue,* 297 U. S. 129, 134, 56 S. Ct. 397, 400.
International R. Co. v. *Davidson,* 257 U. S. 506, 544, 42 S. Ct. 179, 182.

2. CONSTRUED AS DELEGATING TO THE COMMISSIONER OF INTERNAL REVENUE THE RIGHT TO REQUIRE THE MAKING OF AN ELECTION RETROACTIVE TO A TIME SIX MONTHS AFTER FILING THE ORIGINAL RETURNS INVOLVED IN THIS CASE, RENDERS PUBLIC LAW 756 AN UNCONSTITUTIONAL ABDICATION OF LEGISLATIVE POWER.

The Court of Appeals has construed the words of Public Law 756, as authorizing the Commissioner to fix the time for making election to invoke involuntary liquidation and as permitting the Commissioner to require the election to be made not later than "six months after the time of filing his income tax return for the year of the liquidation" (R. 126).

The Commissioner by a 1951 Regulation has effectively denied Petitioner the right to make the election permitted in the 1950 Act, throughout all of the years involved in this case, namely, 1942 through 1947.

There is nothing in the 1950 Act that implies or infers a right in the Commissioner to require the election specified in the Act to be made at a time prior to its effective date. The Act sets no standard, no rule, and no definition for determining the time for making elections. It requires no finding or determination by the Commissioner as a condition to exercising the power granted to him in the statute.

In other words, as construed by this Court, the words of the statute constituted an unlimited and unbridled delegation to the Commissioner to determine in his discretion the time when an election to invoke involuntary liquidation had to be filed, whether retroactive or prospective. Such constitutes an abdication by Congress of its essential functions. See:

Panama Refining Co. v. Ryan, 293, U. S. 388, 55 S. Ct. 241, 248, 252.

Schechter Poultry Co. v. U. S., 295 U. S. 495, 55 S. Ct. 837, 843.

To be valid the exercise of the power of the administrative body issuing the regulation must be clearly defined in the Act, and be "geared to and bounded by the limits of the regulatory system of the Act which it supplements."

American Trucking Ass'n v. U. S., 344 U. S. 298, 73 S. Ct. 307, 316.

Faced with a constitutional violation, or even doubt of such, the Court should construe Public Law 756 as authorizing the Commissioner to fix a reasonable time *after* its enactment for compliance with its provisions relating to election.

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon the score."
>
> *George Moore So. v. Rose, Collector*, 289 U. S. 373, 53 S. Ct. 620, 622 (1933).

3. "TAXABLE YEAR" AS USED IN TREASURY REGULATIONS 118, SECTION 39.22(d)-7(a) WAS IMPROPERLY CONSTRUED TO MEAN ONLY THE MONTHS OF JANUARY AND FEBRUARY, 1952.

The Court of Appeals referring to Section 39.22(d)-7, Treasury Regulations 118 and the provision therein contained authorizing taxpayers to make an election thereunder "at any time not later than December 15, 1952 in the case of the year of liquidation being a taxable year ending before March 1, 1952" states:

> "That reference is inaptly worded, but we think it must be construed as 'in the case of the year of liquidation beginning after December 31, 1951, and ending before March 1, 1952', because in several places it is stated that Regulations 118 are 'applicable only to years beginning after December 31, 1951', and in Section 39.1-1(b) the statement is specific, that 'The Regulations in this part are applicable only with respect to taxable years beginning after December 31, 1951.'" (R. 130.)

To reach this conclusion and thereby deny Petitioner's claims in this action, the Court has been forced to construe the words "taxable year" in the above quoted portion of Regulations 118, as a taxable year of two months, covering only the months of January and February, 1952. We respectfully submit that the Internal Revenue Code, the Regulations thereunder, and the decided cases are to the contrary.

The Internal Revenue Code while recognizing that a re-

turn, as such, may be made for a fractional part of a year, states the following definition of taxable year:

> "'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part."
>
> *Internal Revenue Code,* Section 48(a) U. S. Code, Title 26, Section 48(a).

The Treasury Department Regulations provide:

> "Net income must be computed with respect to a fixed period. Usually that period is twelve months and is known as the taxable year.
>
> The return of a taxpayer is made and his income computed for his taxable year, which in general means his fiscal year, or the calendar year if he has not established a fiscal year."
>
> Treas. Reg. 118, Sec. 39.41-1, 39.41-4.
> Treas. Reg. 111, Sec. 29.41-1, 29.41-4.
> Treas. Reg. 103, Sec. 19.41-1, 19.41-4.

This Court has placed emphasis on the fact that if "taxable year" was intended to mean a fraction of a year, the proper wording would be "the portion of the taxable year."

Helvering v. *Morgan's, Inc.,* 293 U. S. 121, 55 St. Ct. 60, 64.

See:

Commissioner v. *General Machinery Corp.,* 6 Cir. 95 F. 2nd 759.

Palomas Land & Cattle Co. v. *Commissioner,* 9 Cir. 91 F. 2d 100.

Apart from the authorities defining taxable year, the statute and regulations providing for involuntary liquidation, in themselves, bear impressive witness to the correctness of this contention of Petitioner.

Public Law 756, amending Section 22(d)(6), (A), Internal Revenue Code in 1950, by its very terms applies only to "years beginning prior to January 1, 1948." It will be noted that sub-section (A) of Section 22(d)(6), Internal Revenue Code, alone is amended by this Act. As amended sub section (A) reads in pertinent part:

> "(A). Adjustment of Net Income and Resulting Tax; years beginning prior to January 1, 1948. If for *any taxable year beginning after December 31, 1940 and prior to January 1, 1948*, the closing inventory of a taxpayer inventorying goods under the method provided in this sub-section reflects a decrease from the opening inventory of such goods for such year, and if the taxpayer elects." (Emphasis added.)
>
> *Internal Revenue Code*, Section 22(d)(6)(A), as amended by Public Law 756, (See Treas. Reg. 118 at page 5810).

Sub-section (A) above quoted, has no reference in it whatsoever to, and by its terms it is not applicable to, any later years of liquidation, beginning after January 1, 1948.

Later years are expressly covered and dealt with in Sub-section (F) of Section 22(d)(6), Internal Revenue Code. Sub-section (F) was added by amendment to Section 22(d)(6) effected by Public Law 919, approved January 11, 1951, 81st Congress, 2nd Session, 1950, Chapter 1227. See U. S. Congressional Service, 1950, Vol. 1, pages 1260-1261.

Public Law 919 by its terms applies to "Liquidation in taxable years ending after June 30, 1950, and prior to January 1, 1954."

By construing the quoted portion of the regulation as limited to the two months "after December 31, 1951 and before March 1, 1952", the Court has narrowed the scope of both Sub-section A and of Sub-section F. Extending this limitation judicially to Sub-section A is to disregard the provisions of the statute above quoted. In addition it

ignores the plain words of the regulation, which specifically includes as a statutory year of liquidation, any year during "the period of the war", defined as "liquidation occurring in taxable years beginning before January 1, 1948."

Treas. Reg. 118, Section 39.22(d)-7(b).

Nowhere in any of the sub-sections of Section 39.22(d)-7, Regulations 118, can there be found any inference or any basis for the conclusion that a taxable year of two months would be an appropriate and proper year of liquidation. On the contrary, throughout, the intent is disclosed that the year of liquidation as used in the regulations means any of the twelve month periods as specifically defined and set forth in the mother statute under which the regulation was promulgated.

Public Law 756 applies only to years prior to 1948. To permit a regulation attempting to limit its benefits to a two-months period in 1952 is "to create a rule out of harmony with the statute", not permitted under decisions of this Court.

Manhattan Gen. Equip. Co. v. *Commissioner, supra,* 297 U. S. 129, 134, 56 S. Ct. 397, 400.

Accordingly it is respectfully submitted that Section 39.22(d)-7, Regulations 118, as written, requires judgment for Petitioner in this case under the undisputed evidence, for that (a) Petitioner made the election "in literal compliance" with the regulations, R. 70; (b) the election was made at a time "not later than December 15, 1952", namely on September 18, 1948, R. 69; and (c) each year of liquidation involved in the case was "a taxable year ending before March 1, 1952", namely the years ending January 31, 1942, January 31, 1947, both inclusive (R. 79). Such was the sense of Congress in enacting Public Law 756.

It follows that Section 39.22(d)-7 of Regulations 118 should be made applicable in accordance with the specific

language contained in that section rather than the general language contained in Section 39.1-1(b). General language should "not be held to apply to a matter specifically dealt with in another part of the enactment."

MacEvoy Co. v. *U. S.*, 322 U. S. 102, 107, 64 S. Ct. 890 (1944).

Conclusion

This is such a case as merits the consideration of the Court. It is respectfully urged that a Writ of Certiorari issue herein.

Respectfully submitted,

WILLIAM S. PRITCHARD,
WINSTON B. MCCALL,
Counsel for Petitioner.

PRITCHARD, MCCALL & JONES,
Of Counsel.

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LOUIS PIZITZ DRY GOODS COMPANY, INC., PETITIONER

v.

E. L. DEAL, K. T. TYREE, AND EDWARD N. HAMMILL, EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY J. WILLINGHAM, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ALABAMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 103-110) is not reported. The opinion of the Court of Appeals (R. 120-127) is reported at 208 F. 2d 724.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1953. (R. 128.) Taxpay-

er's petition for rehearing was denied on February 3, 1954. (R. 144.) The petition for a writ of certiorari was filed on March 1, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the District Court's decision holding that the taxpayer failed to file timely elections for the taxable years ending January 31, 1942, through January 31, 1947, to apply the involuntary liquidation and replacement provisions of Section 22(d)(6) of the Internal Revenue Code and was not, therefore, entitled to its benefits.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code and the Regulations thereunder are set forth in the Appendix, *infra,* pp. 12-22.

STATEMENT

The pertinent facts in this case, as set forth in the District Court's opinion (R. 103-110), may be summarized as follows:

The taxpayer is an Alabama corporation that operated a large mercantile department store in Birmingham, Alabama. In the course of its business, the taxpayer used the accrual method of accounting and kept its inventory records according to authorized inventory procedure. The taxpayer included in its income tax return for the year ended January 31, 1942, a statement of elec-

tion to use the elective method of computing inventories provided by Section 22(d)(1)(B) of the Internal Revenue Code and in accordance with its election the taxpayer used the "last-in, first-out" or "Lifo" method of computing inventories in the returns it filed for each of the taxable years. (R. 103-104.)

The taxpayer's election was filed on Form 970 and included the following statement (R. 104):

> The taxpayer hereby agrees to such adjustments incident to the change to the elective method, or to the use of such method, or to any later change from such method, in the inventories of prior taxable years or otherwise, as the Commissioner of Internal Revenue upon the examination of the taxpayer's returns for the years involved may deem necessary in order that the true income of the taxpayer may be clearly reflected.
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> * * * * *
>
> The taxpayer has applied the retail inventory method, adjusted to the last-in, first-out basis by using indices of price changes, developed for the individual departments, based upon the company's own experience in determination of cost.

In January, 1946, the Commissioner determined that the taxpayer's use of "Lifo" did not clearly reflect income, and proposed a deficiency against the taxpayer for each of the years involved. However, after a protest by the taxpayer

and a field conference, the taxpayer was permitted to use "Lifo." (R. 104.)

Until after the decision in *Hutzler Brothers Co. v. Commissioner,* 8 T. C. 14, the Commissioner issued no regulations with respect to the computation under the elective method by a taxpayer using the retail inventory method. In 1948 such regulations were issued. On March 9, 1948, the Commissioner issued Mim. 6244, 1948-1 Cum. Bull. 21, which stated in part (R. 105):

> Retailers who have filed, on the basis of the elective method, returns for past years which are still open, and who used indices that are not acceptable to the Commissioner, may file amended returns employing acceptable indices.

On September 18, 1948, the taxpayer filed amended returns for the years ended January 31, 1942, through January 31, 1947, and with these returns, for the first time, filed an election to have applied for each year involved the involuntary liquidation and replacement provisions of Section 22(d)(6) of the Internal Revenue Code. (R. 105.)

In the District Court, both parties filed motions for summary judgment with accompanying exhibits. (R. 48-79, 98-102.) The court granted the Collector's motion, holding that the taxpayer was not entitled to the claimed benefits of Section 22(d)(6) for the taxable years in questions because it had failed to file timely elections to apply its provisions. (R. 103-110.) The Court of Appeals

affirmed. (R. 128.) The taxpayer's petition for a rehearing (R. 129-143) was denied (R. 144).

ARGUMENT

This case does not warrant further review. Contrary to the assertion of the taxpayer (Pet. 7-8), the decision is clearly correct and does not involve a question of general importance which should be settled by this Court. Moreover, there is no conflict between Circuits.

1. While the taxpayer alleges that this case involves questions of general importance, its petition fails to show that the decision will affect any pending case or that it has any importance beyond this case. As will appear more fully, *infra*, the peculiar facts of the case present a narrow issue which does not merit review by this Court.

2. The decision of the Court of Appeals affirming the District Court is correct. The taxpayer in effect concedes that under the Treasury Regulations 111, Section 29.22(d)-7, as amended by T.D. 5841, 1951-1 Cum. Bull. 11 (Appendix, *infra*, pp. 18-20), its elections to apply the involuntary liquidation and replacement provisions of Section 22(d)(6) of the Internal Revenue Code (Appendix, *infra*, pp. 12, 14-18) for the taxable years ending January 31, 1942, through January 31, 1947, were untimely.[1] The taxpayer contends (Pet. 9-11),

[1] The purpose of the involuntary liquidation and replacement election was to permit taxpayers whose inventories had, because of war conditions, become depleted to elect to make future adjustments in their returns if, within a specified time, their inventories should be replaced.

however, that under the plain meaning of Section 22(d)(6)(A) as amended by the Act of September 5, 1950, c. 581, 64 Stat. 592, it was the intention of Congress to allow *all* taxpayers who could have elected to apply the benefits of Section 22(d)(6), but who failed to do so, a reasonable period of time after the enactment of the 1950 amendment to file amended returns for prior years applying its provisions. And, taxpayer continues (Pet. 11-12), in holding that its elections were untimely, the Court of Appeals has given Section 22(d)(6) as implemented by Section 29.22(d)-7 of Regulations 111 to require that an election be made not later than "6 months after the time of filing his income tax return for the year of the liquidation" an unconstitutional construction. There is clearly no merit to the taxpayer's contentions.

Certainly the plain meaning of the words "at such time and in such manner" as they were added by the 1950 amendment to Section 22(a)(6)(A) do not, as the taxpayer contends (Pet. 10), require the Commissioner to issue regulations permitting *all* taxpayers who used the "last-in, first out" or "Lifo" inventory method as provided by Section 22(d)(1) of the Internal Revenue Code (Appendix, *infra,* p. 12) for the years beginning after December 31, 1940, and ending before January 1, 1948, to elect to apply within a reasonable period of time after the enactment of the 1950 amendment its involuntary liquidation and replacement provisions. To determine what Congress actually intended in using that language it is necessary to ex-

amine the legislative history of the 1950 amendment to Section 22(d)(6).

Under the 1950 amendment to Section 22(d)(6) Congress eliminated the requirement that a taxpayer using the "Lifo" inventory method had to elect to apply the provisions of Section 22(d)(6) at the time of filing his return for the year of liquidation. It provided, instead, that the Commissioner was, under regulations approved by the Secretary of the Treasury, to prescribe the procedure by which a taxpayer could invoke the statute. The legislative history of the 1950 amendment shows clearly, as the Court of Appeals found (R. 126), that the intention of Congress was to authorize the Commissioner to issue regulations providing for relief in "hardship" cases. See S. Rep. No. 2366, 81st Cong., 2d Sess., and H. Rep. No. 2756, 81st Cong., 2d Sess. (U. S. Code Cong. Service, 81st Cong., 2d Sess., Vol 2, pp. 3576-3577). Nowhere in the legislative history of the 1950 amendment is there anything which indicates that Congress ever intended in using the words "at such time and in such manner" to permit *all* taxpayers who used the "Lifo" inventory method but who failed to elect to apply the involuntary liquidation and replacement provisions of Section 22(d) (6) to file amended returns applying its provisions, thereby reopening years long closed.

Under the circumstances it is immaterial whether Section 29.22(d)-7 of Regulations 111 fully implements the intention of Congress under the 1950 amendment to Section 22(d)(6) of the Code be-

cause the taxpayer obviously does not, as the Court of Appeals found (R. 126-127), fall within the hardship category at which the amendment was aimed.[2] In filing its original income tax return for the year ending January 31, 1942, the taxpayer included in the return a statement of election to use the "Lifo" method of computing inventories and it used that method in the original returns filed for each of its taxable years through January 31, 1947, but it did not attempt to avail itself in those returns of the privilege of applying the benefits of Section 22(d)(6). It was not until September 18, 1948, more than six months after it filed the last of its original returns for these years, that the taxpayer filed amended returns with elections to apply the involuntary liquidation and replacement provisions of Section 22(d)(6). Taxpayer's elections to apply Section 22(d)(6) were untimely at the time they were filed and their untimeliness was not intended by Congress to be remedied under the 1950 amendment. The Court of Appeals was correct in rejecting the taxpayer's contention that it was prejudiced by the Commissioner's having taken the position that taxpayers using the retail inventory method could not use the "Lifo" inventory method of Section 22(d)(1) until after the Tax Court's

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[2] Moreover, if, as we contend, Congress did not in the 1950 amendment to Section 22(d)(6) make mandatory or automatic an extension of time for the exercise of the election under the circumstances of this case, then discretion was vested in the administrative authorities, and however harsh the denial of relief in a particular case may seem, the remedy lies in an appeal to Congress and not to the Courts. Cf. *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463, 468-469.

decision in *Hutzler Brothers Co.* v. *Commissioner,* 8 T.C. 14, when, in 1948, it issued Mim. 6244 (1948-1 Cum. Bull. 21). There is not in this record the slightest indication that the present taxpayer was misled in regard to its rights because of the confusion which existed for a time with respect to the use of the "Lifo" method. Having in fact elected to use the "Lifo" inventory method over the Commissioner's objection, the taxpayer could, as the Court of Appeals said (R. 124), just as well have invoked the involuntary liquidation and replacement provisions of Section 22(d)(6) when it filed its original returns for the years in issue.

There is also no merit to the taxpayer's contention (Pet. 8) that the Court of Appeals erred in construing Section 39.22(d)-7 of Treasury Regulations 118 (Appendix, *infra,* pp. 21-22) as not remedying the untimeliness of its elections to invoke the involuntary liquidation and replacement provisions of Section 22(d)(6). Taxpayer's contention is untenable for two reasons. First, as the court below observed (R. 127), Section 39.1-1 of Treasury Regulations 118 (Appendix, *infra,* p. 21) expressly provides that Chapter 1 of Regulations 118 is applicable "only with respect to taxable years beginning after December 31, 1951." And, secondly, it is clear that Section 39.22(d)-7 was taken from Section 29.22(d)-7 of Regulations 111 and revised so as to be applicable only with respect to taxable years beginning after December 31, 1951. Section 29.22(d)-7 of Regulations 111 provides that a taxpayer must notify the Commissioner that he in-

tends to invoke the involuntary liquidation and replacement provisions of Section 22(d)(6) not later than six months after filing his income tax return for the year of liquidation "or at any time not later than December 15, 1952, in the case of the year of liquidation being a taxable year ending after June 30, 1950, and before March 1, 1952."[3] In revision, the words "after June 30, 1950, and" were omitted from this phrase in Section 39.22(d)-7 of Regulations 118 to conform with Chapter 1 of Regulations 118, being applicable only as to years beginning after December 31, 1951. Admittedly this does mean, as the taxpayer points out (Pet. 13), that "taxable year" as used in that phrase in Section 39.22(d)-7 is a two month period. The purpose of this was, however, to protect calendar year taxpayers who changed over to a fiscal year basis during the period of January 1, 1952, to March 1, 1952, and elected to apply the involuntary liquidation and replacement provisions of Section 22(d)(6).

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[3] Section 22(d)(6)(F) (Appendix, *infra*, pp. 17-18) was added to Section 22(d)(6) by the Act of January 11, 1951, c. 1227, 64 Stat. 1244, to permit elections to apply the provisions of Section 22(d)(6) to be made for taxable years ending after June 30, 1950, and prior to January 1, 1954.

CONCLUSION

The decision below is correct. There is no conflict in decisions and no other reason appears which would warrant further review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
LEE A. JACKSON,
DUDLEY J. GODFREY, JR.,
Special Assistants to the Attorney General.

APRIL, 1954.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(c) *Inventories.*—Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

(d) [As amended by Section 219(a), Revenue Act of 1939, c. 247, 53 Stat. 862] (1) A taxpayer may use the following method (whether or not such method has been prescribed under subsection (c)) in inventorying goods specified in the application required under paragraph (2):

(A) Inventory them at cost;

(B) Treat those remaining on hand at the close of the taxable year as being: First, those included in the opening inventory of the taxable year (in the order of acquisition) to the extent thereof, and second, those acquired in the taxable year; and

(C) Treat those included in the opening inventory of the taxable year in which such method is first used as having been acquired at the same time and determine their cost by the average cost method.

(2) The method described in paragraph (1) may be used—

(A) Only in inventorying goods (required under subsection (c) to be inventoried) specified in an application to use such method filed at such time and in such manner as the Commissioner may prescribe; and

* * * * *

(3) The change to, and the use of, such method shall be in accordance with such regulations as the Commissioner, with the approval of the Secretary, may prescribe as necessary in order that the use of such method may clearly reflect income.

* * * * *

(5) If a taxpayer, having complied with paragraph (2), uses the method described in paragraph (1) for any taxable year, then such method shall be used in all subsequent taxable years unless—

(A) With the approval of the Commissioner a change to a different method is authorized; or

* * * * *

In either of the above cases, the change to, and the use of, the different method shall be in accordance with such regulations as the Commissioner, with the approval of the Secretary, may prescribe as necessary in order that the use of such method may clearly reflect income.

(6) [As added by Section 119, Revenue Act of 1942, c. 619, 56 Stat. 798; amended by Section 110 (a), Revenue Act of 1943, c. 63, 58 Stat. 21; Act of September 5, 1950, c. 851, 64 Stat. 592; and Section 1 of the Act of January 11, 1951, c. 1227, 64 Stat. 1244] *Involuntary liquidation and replacement of inventory.*—

(A) *Adjustment of net income and resulting tax.—Years beginning prior to January 1, 1948.*—If, for any taxable year beginning after December 31, 1940, and prior to January 1, 1948, the closing inventory of a taxpayer inventorying goods under the method provided in this subsection reflects a decrease from the opening inventory of such goods for such year, and if the taxpayer elects, at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe, to have the provisions of this paragraph apply, and if it established to the satisfaction of the Commissioner, in accordance with such regulations, that such decrease is attributable to the involuntary liquidation of such inventory as defined in subparagraph (B), and if the closing inventory of a subsequent taxable year, ending prior to January 1, 1953, reflects a replacement, in whole or in part, of the goods so previously liquidated, the net income of the taxpayer otherwise determined for the year of such involuntary liquidation shall be adjusted as follows:

(i) Increased by an amount equal to the excess, if any, of the aggregate cost of

such goods reflected in the opening inventory of the year of involuntary liquidation over the aggregate replacement cost; or

(ii) Decreased by an amount equal to the excess, if any, of the aggregate replacement cost of such goods over the aggregate cost thereof reflected in the opening inventory of the year of the involuntary liquidation.

The taxes imposed by this chapter and by chapter 2 for the year of such liquidation, for preceding taxable years, and for all taxable years intervening between the year of liquidation and the year of replacement shall be redetermined, giving effect to such adjustments. Any increase in such taxes resulting from such adjustments shall be assessed and collected as a deficiency but without interest, and any overpayment so resulting shall be credited or refunded to the taxpayer without interest.

(B) *Definition of Involuntary Liquidation.*—The term "involuntary liquidation", as used in this paragraph, means the sale or other disposition of goods inventoried under the method described in this subsection, either voluntary or involuntary, coupled with a failure on the part of the taxpayer to purchase, manufacture, or otherwise produce and have on hand at the close of the taxable year in which such sale or other disposition occurred such goods as would, if on hand at the close of such taxable year, be subject to the application of the provisions of this subsection, if such failure on the part of the tax-

payer is due, directly and exclusively, (i) to enemy capture or control of sources of limited foreign supply; (ii) to shipping or other transportation shortages; (iii) to material shortages resulting from priorities or allocations; (iv) to labor shortages; or (v) to other prevailing war conditions beyond the control of the taxpayer.

* * * * *

(D) [As amended by Section 110(a), Revenue Act of 1943, *supra*] *Election Irrevocable.*—An election by the taxpayer to have the provisions of this paragraph apply, once made, shall be irrevocable and shall be binding for the year of the involuntary liquidation and for all determinations for prior and subsequent taxable years insofar as they are related to the year of liquidation or replacement.

(E) *Adjustment in Certain Cases.*—If the adjustments specified in subparagraph (A) are, with respect to any taxable year, prevented, on the date of the filing of the income tax return of the taxpayer for the year of the replacement, or within three years from such date, by any provision or rule of law (other than this subparagraph and other than section 3761, relating to compromises), such adjustments shall nevertheless be made if, in respect of the taxable year for which the adjustment is sought, a notice of deficiency is mailed or a claim for refund is filed, as the case may be, within three years after the date of the filing of the income tax return for the year of replacement. * * *

(F) [As added by Section 2 of the Act of January 11, 1951, *supra*] *Years Ending After June 30, 1950, and Prior to January 1, 1954.*

(i) *Adjustment of Net Income and Resulting Tax.*—If, for any taxable year ending after June 30, 1950, and prior to January 1, 1954, the closing inventory of a taxpayer inventorying goods under the method provided in this subsection reflects a decrease from the opening inventory of such goods for such year, and if the taxpayer elects, at such time and in such manner and subject to such regulations as the Commissioner with the approval of the Secretary may prescribe, to have the provisions of this paragraph apply, and if it is established to the satisfaction of the Commissioner, in accordance with such regulations, that such decrease is attributable to the involuntary liquidation of such inventory as defined in subparagraph (B) (as modified by clause (ii) of this subparagraph), and if the closing inventory of a subsequent taxable year, ending prior to January 1, 1956, reflects a replacement, in whole or in part, of the goods so previously liquidated, the net income of the taxpayer otherwise determined for the year of such involuntary liquidations shall be increased by an amount equal to the excess, if any, of the aggregate cost of such goods reflected in the opening inventory of the year of involuntary liquidation over the aggregate replacement cost, or decreased by an amount equal to the excess, if any, of the aggregate replacement cost of such goods

over the aggregate cost thereof reflected in the opening inventory of the year of the involuntary liquidation. The taxes imposed by this chapter and by chapter 2 for the year of such liquidation, for preceding taxable years, and for all taxable years intervening between the year of liquidation and the year of replacement shall be redetermined, giving effect to such adjustments. Any increase in such taxes resulting from such adjustments shall be assessed and collected as a deficiency but without interest, and any overpayment so resulting shall be credited or refunded to the taxpayer without interest.

* * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.22(d)-7 [As amended by T.D. 5841, 1951-1 Cum. Bull. 11, 14, and T.D. 5932, 1952-2 Cum. Bull. 76, 79] *Involuntary Liquidation and Replacement.*—If prevailing war conditions beyond the control of the taxpayer, or certain prescribed postwar conditions beyond his control, should render it impossible either during the period of the war or within the prescribed postwar period for a taxpayer using the elective inventory method to have on hand at the close of the taxable year a stock of merchandise in kind and description like that included in the opening inventory for the year, or in a quantity equal to that of the opening inventory, the resulting inventory decrease for the year will be regarded, at the election

of the taxpayer, as reflecting an involuntary liquidation subject to replacement. If the taxpayer notifies the Commissioner at any time not later than 6 months after the time of filing his income tax return for the year of the liquidation, or at any time not later than December 15, 1952, in the case of the year of liquidation being a taxable year ending after June 30, 1950, and before March 1, 1952, * * * that he intends to effect a replacement of the liquidated stock, in whole or in part, and that he desires to have applied in his case the involuntary liquidation and replacement provisions of section 22(d)(6), and if he establishes to the satisfaction of the Commissioner the involuntary character of the liquidation to which his stock has been subjected, effect shall be given, when replacement has been made, to an adjustment of net income for the year of liquidation to the extent of the difference between the replacement costs incurred and the original inventory cost of the base stock inventory liquidated. (For extensions of time, see subpart H * * *, as added by Treasury Decision 5391 [C. B. 1944, 474], approved July 14, 1944, and amended by Treasury Decision 5400 [C. B. 1944, 476], approved August 22, 1944).

* * * * *

If the taxpayer would have the involuntary liquidation and replacement provisions applicable with respect to any inventory decrease, he must so elect within the time prescribed by these regulations. In making such election, the taxpayer shall attach to his return and

make a part thereof, or he shall furnish separately to the Commissioner, a statement setting forth the following matters: (1) the wish of the taxpayer to invoke the involuntary liquidation and replacement provisions; (2) a detailed list or other identifying description of the items of merchandise claimed to have been subjected to involuntary liquidation and the extent to which replacement is intended; (3) the circumstances relied upon as rendering the taxpayer unable to maintain throughout the taxable year a normal inventory of the items involved, including evidence of the applicable National Production Authority inventory control figures for the beginning and the close of the taxable year (or if none, a statement to that effect), allotments applied for, allotments received, and reason for failure to place allotments received; (4) detailed proof of such circumstances to the extent that they may not be the subject-matter of common knowledge; (5) a full description of what efforts were made on the part of the taxpayer to effect replacement during the taxable year and the result of such efforts; and (6) in the case of an election made pursuant to an extension of time sought under subpart H more than 6 months after the filing of the return for the year of liquidation, the circumstances relied upon as justifying the election at such time, together with a disclosure of the extent, if any, to which replacements have already been made.

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Treasury Regulations 118, promulgated under the Internal Revenue Code:

Sec. 39.1 *Statutory provisions; application of Chapter 1.*

* * * * *

Sec. 39.1-1. *Scope and applicability of regulations.* (a) The regulations in this part deal with (1) the taxes imposed by chapter 1 of the Internal Revenue Code, except the excess profits tax imposed under subchapter D, (2) the surtax imposed by subchapter A of chapter 2 (sections 500 to 511, inclusive) upon the undistributed subchapter A net income of personal holding companies, and (3) administrative provisions relating to such taxes.

(b) The regulations in this part are applicable only with respect to taxable years beginning after December 31, 1951.

Sec. 39.22(d)-7 *Involuntary liquidation and replacement.* (a) If prevailing war conditions beyond the control of the taxpayer, or certain prescribed post-war conditions beyond his control, should render it impossible either during the period of the war or within the prescribed post-war period for a taxpayer using the last-in first-out inventory method to have on hand at the close of the taxable year a stock of merchandise in kind and description like that included in the opening inventory for the year, or in a quantity equal to that of the opening inventory, the resulting inventory decrease for the year will be regarded, at the election of the taxpayer, as reflecting an involuntary liquida-

tion subject to replacement. If the taxpayer notifies the Commissioner at any time not later than six months after the time of filing his income tax return for the year of the liquidation, or at any time not later than December 15, 1952, in the case of the year of liquidation being a taxable year ending before March 1, 1952, that he intends to effect a replacement of the liquidated stock, in whole or in part, and that he desires to have applied in his case the involuntary liquidation and replacement provisions of section 22(d)(6), and if he establishes to the satisfaction of the Commissioner the involuntary character of the liquidation to which his stock has been subjected, effect shall be given, when replacement has been made, to an adjustment of net income for the year of liquidation to the extent of the difference between the replacement costs incurred and the original inventory cost of the base stock inventory liquidated. For extensions of time, see Subpart G of the regulations in this part.
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